Wan Bakri bin Wan Ahmad v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO T-05–24 OF 2007
LOW HOP BING, APANDI ALI AND AZAHAR MOHAMED JJCA
20 JULY 2012

Criminal Law — Dangerous drugs — Trafficking — Appeal against conviction and sentence — Possession of 402.03g of cannabis — Whether triggered off presumption under s 37(da) — Dangerous Drugs Act 1952 s 37(da)

Criminal Procedure — Charge — Alternative charges — Possession — Whether learned trial judge misdirected himself when he failed to recognise that with prosecution's stance in preferring an alternative charge of possession, he should not have convicted the accused on the offence of trafficking

Criminal Procedure — Sentencing — Commencement of sentence of imprisonment — Accused remanded since his arrest — Imposition of imprisonment since date of sentence — Whether trial judge erred in ordering term of imprisonment to commence from date of sentence — Whether run counter to fairness and interest of justice — Whether sentences should commence from date accused lost his liberty ie when he was first remanded

Evidence — Information leading to fact discovered — Evidence Act 1950, s 27 — Discovery of drugs in consequence of information received from accused — Whether information involuntarily — Whether trial judge erred in admitting information — Whether trial judge's finding based exclusively on his observation of demeanour and credibility of police officer — Whether trial judge erred in his application of s 27 to his specific finding of facts

The appellant ('the accused') was appealing against the decision of the High Court convicting the accused for the offence of trafficking in dangerous drugs. In this case, SP7 arrested the accused and asked him about his drug trafficking activities. The accused responded by leading SP7 to the discovery of a cigarette box containing cannabis in the Kancil car. The cannabis was later confirmed to weigh 77.35g which is the subject matter of charge 2. Subsequently, the accused led SP7 and his team to another house where the accused pointed to SP7 a plastic container on the floor. In that plastic container, there were four compressed slabs which were later confirmed to contain 402.03g of cannabis which is the subject matter of the principal trafficking charge 1. Thereafter, the

accused led SP7 and his team to another house. In front of the house, SP7 saw a Proton Wira which was locked. The accused used the keys, which he took out from his pocket, to open the car and took out from its dashboard a plastic bag in which was a cigarette box containing substances which were later confirmed to be 30.99g of cannabis, the subject matter of charge 3. The accused's defence was essentially that he had no knowledge whatsoever of the presence of the cannabis in the car and in the houses. He denied having given the information leading to the discovery of the cannabis. The issues raised in this appeal were as follows: (i) the learned trial judge had misdirected himself when he failed to recognise that with the prosecution's stance in preferring an alternative charge of possession, he should not have convicted the accused on the offence of trafficking; (ii) the learned trial judge had erred in admitting the information under s 27 of the Evidence Act 1950 ('Act'); and (iii) the learned trial judge had erred in ordering the term of imprisonment to commence from the date of sentence, as it ought to run from the date of arrest.

Held, dismissing the appeal, affirming the conviction and sentence:

(1) The fact of this case attracted the application of the presumption of trafficking under s 37(da) of the Dangerous Drugs Act 1952 ('DDA'), which the learned trial judge had correctly invoked. The learned trial judge was not in doubt that the prosecution had proved possession and had thereby invoked the presumption under s 37(da). That being the case, there was no legal requirement for the trial judge to make a finding on the alternative to charge. In the instant appeal, on the evidence adduced at the trial, the trial judge was not left in doubt as to the possession of 402.03g of cannabis which consequently triggered off the presumption under s 37(da) (see paras 7–9).

(2) Further, the trial judge had embarked on a maximum evaluation of the evidence of SP7. There was not an iota of evidence to suggest that the accused had given his information involuntarily. There was also no suggestion of any forced used by SP7 on the accused. The trial judge's finding was based exclusively on his observation of the demeanour and credibility of SP7. Hence, there was no error in the trial judge's application of s 27 of the Act to his specific finding of facts (see para 13).

(3) On the issue of the commencement date of the terms of imprisonment, it was pertinent to note that the accused had been remanded since the date of his arrest. Hence, the accused had been deprived of his liberty from that date. The imposition of the terms of sentences from the date of sentence would mean that the period of his remand had been disregarded. That would run counter to fairness and the interest of justice. The sentences should therefore commence from the date when he lost his liberty ie when he was first remanded (see para 16).

[Bahasa Malaysia summary

Perayu ('tertuduh') merayu terhadap keputusan Mahkamah Tinggi yang mensabitkan tertuduh bagi kesalahan pengedaran dadah berbahaya. Di dalam kes ini, SP7 menangkap tertuduh dan menyoalnya tentang aktiviti pengedaran dadah. Tertuduh membalas dengan membawa SP7 kepada penemuan kotak rokok yang mengandungi kanabis di dalam kereta Kancil. Kanabis tersebut kemudiannya disahkan seberat 77.35g yang merupakan subjek perkara pertuduhan 2. Kemudian, tertuduh membawa SP7 dan pasukannya ke rumah satu lagi di mana tertuduh menunjukkan kepada SP7 suatu bekas plastik di atas lantai. Di dalam bekas plastik itu, terdapat empat ketulan mampat yang kemudiannya disahkan mengandungi 402.03g kanabis yang merupakan subjek perkara pengedaran utama pertuduhan 1. Selepas itu, tertuduh membawa SP7 dan pasukannya ke rumah satu lagi. Di hadapan rumah tersebut, SP7 nampak sebuah kereta Proton Wira yang terkunci. Tertuduh menggunakan kunci, yang dikeluarkan daripada saku seluarnya, untuk membuka kereta tersebut dan mengeluarkan daripada papan pemuka, sebuah beg plastik yang di dalamnya terdapat kotak rokok mengandungi bahan yang kemudiannya disahkan sebagai 30.99g kanabis, subjek perkara pertuduhan 3. Pembelaan tertuduh adalah pada asasnya bahawa dia tidak mempunyai pengetahuan tentang kewujudan kanabis di dalam kereta dan di dalam rumah-rumah tersebut. Dia menafikan memberikan maklumat yang menjurus kepada penemuan kanabis tersebut. Isu yang dibangkitkan di dalam rayuan ini adalah seperti berikut: (i) hakim perbicaraan telah tersalah arah dirinya apabila gagal memastikan perkara tersebut dengan pendirian pihak pendakwaan dalam mengenakan pertuduhan alternatif milikan, dia sepatutnya tidak mensabitkan tertuduh bagi kesalahan pengedaran; (ii) bahawa hakim perbicaraan yang bijaksana telah terkhilaf dalam memasukkan maklumat di bawah s 27 Akta Keterangan 1950 ('Akta'); dan (iii) hakim perbicaraan yang bijaksana terkhilaf dalam memerintahkan tempoh pemenjaraan bermula dari tarikh penghukuman, kerana ia sepatutnya bermula dari tarikh penangkapan.

Diputuskan, menolak rayuan, mengesahkan sabitan dan hukuman:

(1) Fakta kes ini membangkitkan pemakaian anggapan pengedaran di bawah s 37(da) Akta Dadah Berbahaya 1952 ('DDA'), yang mana hakim perbicaraan yang bijaksana telah bangkitkan dengan betul. Hakim perbicaraan yang bijaksana tidak ragu-ragu bahawa pihak pendakwaan telah membuktikan milikan dan telah dengan itu membangkitkan anggapan di bawah s 37(da). Dengan itu, tidak ada keperluan dari segi undang-undang untuk hakim perbicaraan menggunakan penemuan bagi pertuduhan alternatif. Di dalam rayuan ini, atas keterangan yang dikemukakan, hakim perbicaraan tidak berada dalam keadaan ragu-ragu tentang milikan 402.03g kanabis yang telah mencetus anggapan di bawah s 37(da) (lihat perenggan 7–9).

(2) Selanjutnya, hakim perbicaraan juga telah memulakan penilaian

maksimum atas keterangan SP7. Tidak ada sedikit pun keterangan yang mencadangkan bahawa tertuduh telah memberikan maklumat secara tidak sukarela. Juga tidak ada cadangan bahawa apa-apa paksaan telah digunakan oleh SP7 terhadap tertuduh. Penemuan hakim perbicaraan adalah berdasarkan secara eksklusif kepada pemerhatiannya terhadap tingkah laku dan kebolehpercayaan SP7. Maka, tidak ada kekhilafan di dalam pemakaian s 27 Akta oleh hakim perbicaraan bagi penemuan fakta spesifiknya (lihat perenggan 13).

(3) Atas isu permulaan tarikh tempoh pemenjaraan, adalah penting untuk diberi perhatian bahawa tertuduh berada dalam tahanan semenjak tarikh penangkapannya. Maka, tertuduh telah dinafikan kebebasannya dari tarikh tersebut. Pengenaan tempoh hukuman dari tarikh hukuman akan bermaksud bahawa tempoh penahanannya tidak diambil kira. Itu akan bertentangan dengan keadilan dan kepentingan keadilan. Hukuman, dengan itu, sepatutnya bermula dari tarikh bila dia kehilangan kebebasannya, iaitu apabila dia mula ditahan (lihat perenggan 16).]

Notes

For a case on commencement of sentence of imprisonment, see 5(2) *Mallal's Digest* (4th Ed, 2012 Reissue) para 4684.

For cases on alternative charges, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1192–1206.

For cases on Evidence Act 1950, s 27, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2097–2099.

For cases on trafficking, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 205–300.

Cases referred to

Francis Anthonysamy v Public Prosecutor [2005] 3 MLJ 389; [2005] 2 CLJ 481, FC (refd)

Goi Ching Ang v Public Prosecutor [1999] 1 MLJ 507; [1999] 1 CLJ 829, FC (refd)

Leong Bon Huat v Public Prosecutor [1993] 3 MLJ 11, SC (distd)

Public Prosecutor v Ang Soon Huat [1991] 1 MLJ 1, HC (distd)

Legislation referred to

Dangerous Drugs Act 1952 s 37(da)
Evidence Act 1950 s 27

Appeal from: Criminal Trial No 45–09 of 2003 (High Court, Kuala Lumpur)

Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the appellant.
Najib bin Zakaria (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Low Hop Bing JCA (delivering judgment of the court):

APPEAL

[1] This appeal by the appellant ('the accused') concerns the decision of the Kuala Terengganu High Court on the following charges:

Charge	Offence	Decision
Principle Charge 1	Trafficking in 402.03g of cannabis	The accused was found guilty, convicted and sentenced to death
Alternative to Charge 1	Possession of 402.03g of cannabis	—
Charge 2	Possession of 77.35g of cannabis	The accused was found guilty, convicted and sentenced to 14 years imprisonment from the date of sentence
Charge 3	Possession of 30.99g of cannabis	The accused was found guilty, convicted and sentenced to three years imprisonment from the date of sentence

FINDING OF FACTS

[2] In essence, the learned trial judge's finding of facts may be summarised as follows:

(a) The evidence adduced for the prosecution unfolded that on 10 July 2003, Chief Inspector Ahmad Rahim bin Mohamed ('SP7'), acting on information on drug trafficking activities, gathered his men and proceeded to a house known as No 3413, Kg Mengabang Tengah, Batu Buruk, Kuala Terengganu. When SP7 reached the house, he asked one Zabidah bt Mahmood ('SP3'), the accused's first wife, whether the accused lived there. SP3 told SP7 that the accused was not at home. SP7 and his men remained in the house. At about 7.50pm, SP7 saw a Kancil car bearing registration No TAB 2304 driven by the accused together with a boy and the accused's daughter ('SP4'). When the accused arrived at the house, SP7 arrested him and asked him about his drug trafficking activities. The accused responded by leading SP7 to the discovery of a cigarette box containing cannabis in the Kancil car. The cannabis was later confirmed to weigh 77.35g which is the subject matter of charge 2;

(b) the accused then led SP7 and his team to another house at No 763C, Kg

Kubang Bakong and arrived there at about 8.40pm. One Zuraida bt Mamat ('SP5'), the accused's second wife, was in the house. SP7 entered the house and asked SP5 to sit in the living hall. The accused was brought to the back room where the accused pointed to SP7 a plastic container on the floor. In that plastic container, there were four compressed slabs which were later confirmed to contain 402.03g of cannabis which is the subject matter of the principal trafficking charge 1;

(c) from the Bakong house, the accused led SP7 and his team to another house at No 88, Ladang Primula Hotel, Kuala Terengganu. SP7, his team and the accused reached the house at about 9.20pm. In front of the house, SP7 saw a Proton Wira No TT 2312. The car was locked. The accused used the keys, which he took out from his pocket, to open the car and took out from its dashboard a plastic bag in which was a cigarette box containing substances which were later confirmed to be 30.99g of cannabis, the subject matter of charge 3; and

(d) the accused's defence was essentially that he had no knowledge whatsoever of the presence of the cannabis in the car and in the houses. He denied having given the information leading to the discovery of the cannabis.

ALTERNATIVE CHARGE FOR POSSESSION

[3] Learned counsel Mr Hisyam Teh Poh Teik's first ground of appeal is that the learned trial judge had misdirected himself when he failed to recognise that with the prosecution's stance in preferring an alternative charge of possession, he should not have convicted the accused on the offence of trafficking. Support was sought in *Public Prosecutor v Ang Soon Huat* [1991] 1 MLJ 1 (HC) Singapore and *Leong Bon Huat v Public Prosecutor* [1993] 3 MLJ 11 (SC).

[4] Learned deputy public prosecutor Mr Najib Zakaria responded that the learned trial judge had correctly convicted the accused on principal charge 1 and so there was no necessity to consider the alternative to charge 1.

[5] We shall now proceed to consider the two authorities relied on by the accused. In *Ang Soon Huat*, Chan Sek Keong J (now CJ Singapore) and Chua J, stated in the concluding paragraph of their grounds of judgment that 'the principle that where the court is, on the evidence, left in doubt as to whether the accused had committed an offence in a lower or a higher degree of seriousness, the court should make a finding in the lower degree, particularly in a case in which a finding in a higher degree will give rise to a mandatory sentence of death'.

[6] *Ang Soon Huat*, was followed in *Leong Bon Huat*.

[7] Our perusal of the appeal record herein revealed that the accused was in affirmative possession of the 402.03g of cannabis. This fact attracts the application of the trafficking presumption under s 37(da) of the Dangerous Drugs Act 1952, which the learned trial judge had correctly invoked (a reference hereinafter to a section is a reference to that section in the Dangerous Drugs Act 1952).

[8] It is clear to us that the learned trial judge was not in doubt that the prosecution had proved possession and has thereby invoked the presumption under s 37(da). That being the case, there was no legal requirement for the learned judge to make a finding on the alternative to charge 1.

[9] We are of the view that the principle stated in *Ang Boon Huat*, and *Leong Bon Huat*, is applicable if and only if the court is, on the evidence, left in doubt as to whether the accused had committed an offence in a lower or higher degree of seriousness. In the instant appeal, we find that, on the evidence adduced at the trial, the learned trial judge was not left in doubt as to the possession of 402.03g of cannabis which consequently triggered off the presumption under s 37(da). In the circumstances, with the utmost respect, we hold that the aforesaid two authorities are readily distinguishable and hence unhelpful to the accused.

SECTION 27 INFORMATION

[10] The next ground of appeal is that the learned trial judge had erred in admitting the information under s 27 of the Evidence Act 1950. The prosecution disagreed.

[11] We note that no issue was raised in relation to the involuntariness of the s 27 statement or information given by the accused to SP7.

[12] An illuminating judgment on the scope of s 27 was delivered by the Federal Court through Augustine Paul FCJ (as he then was) in *Francis Anthonysamy v Public Prosecutor* [2005] 3 MLJ 389; [2005] 2 CLJ 481 (FC). The principles may be stated as follows:

(a) *Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507; [1999] 1 CLJ 829, cannot be understood to mean that a s 27 statement must be excluded in all instances where it was supplied involuntarily. That case did not profess to lay down such a rule. The facts of each case are important. The ratio that can be gleaned from *Goi Ching Ang*, is that a court, in considering the

exclusion of a s 27 statement on the ground of involuntariness, must take into account the facts of the case and the degree of force used;

(b) the degree of involuntariness that can be said to be sufficient to exclude a s 27 statement in the exercise of the discretion of the court must be balanced against the fact that involuntariness is not a condition of admissibility of such a statement; and

(c) the circumstances of involuntariness must indeed be extraordinary in order to exclude a statement on a ground which, in the first place, does not affect its admissibility in law.

[13] In the instant appeal, the learned trial judge had embarked on a maximum evaluation of the evidence of SP7. There was not an iota of evidence to suggest that the accused had given his information involuntarily. There was also no suggestion of any force used by SP7 on the accused. We are of the view that the learned judge's finding is based exclusively on his observation of the demeanour and credibility of SP7. We find no error in his application of s 27 to his specific finding of facts.

SENTENCE FROM DATE OF ARREST

[14] The third and final ground of appeal is that the learned trial judge had erred in ordering the term of imprisonment to commence from the date of sentence, as it ought to run from the date of arrest.

[15] The prosecution supported the date of commencement of the sentences of imprisonment from the date of the sentences as ordered by the learned trial judge.

[16] On the issue of the commencement date of the terms of imprisonment, it is pertinent for us to point out that the accused had been remanded since the date of his arrest. Hence, the accused has been deprived of his liberty from that date. The imposition of the terms of sentences from the date of sentence would mean that the period of his remand had been disregarded. That would run counter to fairness and the interest of justice. The sentences should therefore commence from the date when he lost his liberty ie when he was first remanded.

CONCLUSION

[17] On the foregoing grounds, we dismiss this appeal and affirm the decision of the High Court relating to the conviction and sentence on principal charge 1.

[18] On the commencement date for the terms of imprisonment, we agree with the defence contention that the imprisonment terms should commence from the date of arrest. We therefore allow this part of the appeal and order the sentence of 14 years on Charge 2 to commence from the date of his arrest, while the sentence of imprisonment on charge 3 shall commence thereafter.

Appeal dismissed, conviction and sentence affirmed.

Reported by Ashgar Ali Ali Mohamed